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In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (A. 107–114) is reported at 507 F. 2d 832.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1974. The petition for a writ of certiorari was filed on January 10 1975, and was granted on March 31, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government is constitutionally barred from convicting a defendant for the sale of contra-

band that he procured from an informant or government agent.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution in pertinent part provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment, to be followed by a three-year term of special parole on each count. The district court suspended imposition of the sentence and placed petitioner on probation for five years.[1] The court of appeals affirmed, one judge dissenting (A. 107–115).

1. The government's evidence showed that petitioner and Jule Hutton, a government informant, became acquainted at a tavern in St. Louis where the two frequently played pool. On February 25, 1974, while the two were at the tavern, petitioner told Hutton that he needed money, knew of a source of heroin, and would sell a certain quantity for $155. Hutton replied that he knew some potential buyers, whereupon petitioner asked him to "get in touch with those people and let me know what happens" (A. 6, 90). Hutton called Special Agent Terry Sawyer of the Drug Enforcement Administration and told him of his conversation with petitioner (A. 6),[2] and then reported to petitioner that a meeting had been arranged at 10:00 p.m. that evening with a buyer. Petitioner left the tavern and returned 10 or 15 minutes later, saying "everything [is] all right" (A. 6–7).

Petitioner and Hutton met Sawyer and another agent, James McDowell, at 10:00 p.m., at which time petitioner gave Sawyer a tinfoil packet of heroin (A. 8–9). After McDowell tested the drug for purity (A. 10), Sawyer paid petitioner.[3] Sawyer then asked about buying more heroin. Petitioner replied, "[y]ou can get better stuff if you [come] up with bigger money" (A. 73), and he gave Sawyer a telephone number at which he could be reached (A. 32–33).

On the following day, petitioner and Sawyer, by telephone, made arrangements for a second sale (A. 75–76). Petitioner persuaded Hutton to accompany him to the place where he was to meet Sawyer (A. 12–13, 76). At that meeting, petitioner once again gave Sawyer a tinfoil packet of heroin, which he offered to sell for $500.[4] After McDowell determined that the substance was in fact heroin, petitioner was arrested (A. 14, 33–35).

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[1] The term of probation was made to run concurrently with the remainder of a state term of 28 to 30 years' imprisonment petitioner was serving for armed robbery (Tr. 218). Petitioner had served four years of that sentence before escaping several months prior to his arrest in this case (A. 60–62).

[2] Hutton testified that at the time he had identified petitioner to Sawyer as "Michael Byers," an alias used by petitioner (A. 5–8).

[3] This was the transaction charged in Count 1.

[4] This transaction was charged in Count 2.

Petitioner's defense was based upon an alleged absence of *scienter*. He testified that Hutton had proposed the sale of a non-narcotic counterfeit drug, which Hutton would obtain from a friend, to gullible acquaintances who would be led to believe that they were buying heroin (A. 63–67). Petitioner claimed that they had successfully duped one buyer with fake drugs supplied by Hutton, and that he had urged Hutton to arrange another, similar transaction (A. 67–70). According to petitioner, Hutton several days later told him that he had more buyers in line and supplied him with tinfoil packets of what petitioner claimed to believe to be a merely counterfeit drug (A. 70–72, 77–79). As the court of appeals put it (A. 108–109), the buyers turned out to be Agents Sawyer and McDowell and the substance turned out to be heroin.

Petitioner testified that he neither intended to sell nor knew that he was selling heroin; he claimed that he thought he was dealing in "some kind of compound with pollutant in it" (A. 78–79). Petitioner also testified, however, that he had become addicted to heroin while in the military and remained addicted for at least three years after discharge (A. 59–61). His testimony further showed that he was well acquainted with the appearance of the drug and had had some contact with it during the several months between his escape from state prison and his arrest by the federal agents in this case.[5]

[5] Petitioner testified, "The heroin I have seen since I have been back, since I have been out of the penitentiary, has been brown. Before that it was usually white, a white powdery flour-like substance" (A. 87).

2. Petitioner did not request a standard entrapment instruction. Instead, petitioner asked the district court to charge the jury to acquit, regardless of his predisposition, if it found that the heroin he had sold to the agents had been supplied to him by Hutton (A. 104–105):

> The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.
>
> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offense charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

The trial court refused the requested instruction (A. 95–96). The court did, however, submit to the jury the issue of *scienter* raised by petitioner's testimony, and the jury found petitioner guilty.

3. The court of appeals affirmed petitioner's conviction on the basis of *United States* v. *Russell*, 411 U.S. 423. The court reasoned that "the extent of Government participation in the commission of the crime, under the facts claimed by [petitioner, does not] warrant an entrapment defense based upon Government conduct, apart from * * * predisposition" (A. 112;

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507 F. 2d at 836).[6] Judge Heaney, dissenting, believed that petitioner's claim that the government supplied him with the contraband raised a due process defense, left open in *Russell,* based on "outrageous" governmental conduct (A. 114–115; 507 F. 2d at 837).

Because of a conflict among the courts of appeals on the question presented in this case,[7] and because the question is of considerable importance to effective law enforcement and affects a substantial volume of litigation, the United States did not oppose the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The rule petitioner contends for, that due process forbids conviction of a defendant for selling contraband he procured from the government, is precluded by this Court's decision in *United States* v. *Russell,*

[6] The court also noted that the trial judge did not err in failing to give the standard entrapment instruction based on predisposition since petitioner had never requested such an instruction, did not raise the issue on appeal, and, in any event, had conceded the existence of predisposition at oral argument (A. 113; 507 F. 2d at 836).

[7] The Court of Appeals for the Seventh Circuit has concluded, like the court below, that the supplying of contraband by a government agent does not constitute entrapment *per se* or otherwise bar the defendant's conviction. See *United States* v. *McGrath*, 494 F. 2d 562. Cf. *United States* v. *Johnson*, 484 F. 2d 165 (C.A. 9), certiorari denied, 414 U.S. 1112; *United States* v. *Rosner*, 485 F. 2d 1213 (C.A. 2). See also *United States* v. *Spivey*, 508 F. 2d 146 (C.A. 10), certiorari denied, April 28, 1975 (No. 74–5971). On the other hand, the Fifth Circuit has determined that, notwithstanding the *Russell* decision, "the law of this Circuit is that a defendant, where entrapment is an issue, may be acquitted for lack of predisposition, or, even though disposed, where the undercover agent supplies him with the contraband." *United States* v. *Mosley*, 496 F. 2d

411 U.S. 423. In that case the defendant was convicted for the illegal manufacture and sale of a drug he had made with a scarce chemical ingredient supplied by a government agent posing as a co-venturer in crime. Notwithstanding that the chemical was difficult for private individuals to obtain, and indispensable to defendant's crime, the Court ruled (411 U.S. at 432) that the government's conduct had fallen "far short" of violating the Due Process Clause.

This case is not constitutionally distinguishable from *Russell.* Petitioner does not claim, and, given his testimony, could not claim, that the government was his only source of heroin. Thus, the heroin allegedly supplied him was no more likely to result in the "manufacturing of crime" (Pet. Br. 21) than the chemical supplied in *Russell.* Nor is the fact that the heroin was a *"sine qua non"* (Pet. Br. 21) of petitioner's crime any basis for a distinction: in *Russell* this Court approved (411 U.S. at 432) the government's "supply of some item of value that the [defendant] requires * * *." Moreover, the provision of contraband is no more inducive to criminality than the provision of any other indispensable means, and the traditional entrapment defense in any event adequately protects the "otherwise innocent" (*Sorrells* v. *United States,* 287 U.S. 435, 448) against law enforcement practices that might overbear their will.

Adoption of the rule urged by petitioner would

1012, 1016. See also *United States* v. *Gomez-Rojas*, 507 F. 2d 1213 (C.A. 5); *United States* v. *Oquendo*, 490 F. 2d 161 (C.A. 5); *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5). The Third Circuit has now apparently joined the Fifth in this view. See *United States* v. *West*, 511 F. 2d 1083.

gravely impair the government's ability to enforce the narcotics laws. Illegal narcotics transactions are difficult to detect. Undercover activity was recognized in *Russell* (411 U.S. at 432) as "the only practicable means of detection." A constitutional proscription against the provision of contraband would improperly afford narcotics traffickers a ready means of testing prospective confederates.

Accordingly, governmental furnishing of contraband cannot be a *per se* defense; in any given case, it is merely one fact to be considered with others in connection with the defense of entrapment. Moreover, an unyielding constitutional rule here would ignore the variety of circumstances under which the government may be said to "supply" contraband. In rare cases a government agent may furnish contraband directly. But in most cases the government will have no knowledge of the defendant's source of contraband. Indeed, that appears to be the case here. If a defendant procures contraband from an informant who is acting without the knowledge or approval of the government, there clearly is no basis for requiring an acquittal.

ARGUMENT

THE GOVERNMENT IS NOT CONSTITUTIONALLY BARRED FROM CONVICTING A DEFENDANT FOR SELLING CONTRABAND THAT HE PROCURED FROM AN INFORMANT OR GOVERNMENT AGENT

The issue presented here is best understood in the context of this Court's decision in *United States* v. *Russell,* 411 U.S. 423. In *Russell,* an undercover narcotics agent had furnished the defendant with phenyl-

2-propanone, an essential ingredient in the manufacture of methamphetamine, in return for a portion of the methamphetamine that the defendant produced; the defendant was then prosecuted for the unlawful manufacture and sale of that methamphetamine. The defendant, who conceded that he had been predisposed to commit the charged offenses, nevertheless contended that the government's participation in the illegal enterprise was such as to require his acquittal. This contention rested upon two alternative theories: that the nonconstitutional defense of entrapment should rest exclusively upon the type and degree of governmental conduct, without regard to the defendant's predisposition to commit the charged offense, and that due process precludes conviction of a defendant to whom the government has furnished means indispensable to the commission of the crime.

This Court rejected both theories. With respect to the defendant's argument concerning the proper scope of the nonconstitutional defense of entrapment, the Court reaffirmed its prior holdings in *Sorrells* v. *United States,* 287 U.S. 435, and *Sherman* v. *United States,* 356 U.S. 369, that "the principal element in the defense of entrapment [is] the defendant's predisposition" (411 U.S. at 433). As to that issue, the Court concluded that the "[r]espondent's concession * * * that the jury finding as to predisposition was supported by the evidence is, therefore, fatal to his claim of entrapment" (411 U.S. at 436).

The respondent's due process argument in *Russell* was similarly rejected (411 U.S. at 431–432):

> While we may some day be presented with a situation in which the conduct of law enforce-

> ment agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California,* 342 U.S. 165 (1952), the instant case is distinctly not of that breed. * * * The law enforcement conduct here stops far short of violating that "fundamental fairness * * *" mandated by the Due Process Clause of the Fifth Amendment. *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246 (1960).

In this case, petitioner has conceded both that he was predisposed to traffic in heroin (A. 113, n. 5; 507 F. 2d at 836, n. 5) and, in view of *Russell,* that this case "is not to [be] regard[ed] * * * as an entrapment case at all" (Pet. Br. 17). Petitioner rests his case entirely upon a claimed denial of due process: he contends that where an informant or government agent has furnished a defendant with the contraband that he is indicted for subsequently selling, "due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." For the reasons we discuss below, we disagree.[8]

[8] One of petitioner's arguments can be disposed of at the outset. He appears to argue (Pet. Br. 18–20) that to convict a defendant for the sale of contraband that he procured from an informant or other government agent entails a constitutionally impermissible presumption "that the accused would commit a similar offense in the future" (Pet. Br. 19). That argument is without substance; there was no unconstitutional presumption here. Even if, as petitioner claims, an informant or government agent furnished him with the heroin that he was convicted for having sold, his conviction nevertheless rested not upon any constitutionally impermissible presumption about crimes that he might commit in the future but rather upon conclusive evidence that he already had committed a particular crime.

By way of preface, however, we begin with a few words regarding the relationship between the instant case and the doctrine of entrapment as it has evolved in federal law. This is not, as petitioner soundly concedes, an entrapment case. The doctrine of entrapment is concerned with the evil of government conduct that "plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Sherman* v. *United States, supra,* 356 U.S. at 376. That much was common ground shared by the majorities in *Sherman* and *Sorrells* and the concurrences of Justices Roberts and Frankfurter. The sole ground of disagreement involved whether an objective or subjective standard should be employed in gauging the success of the wrongdoer's entrapment defense.

At bottom, petitioner's argument on this point is indistinguishable from the contention that to deny the defense of entrapment to a defendant who, like petitioner, was predisposed to commit the offense with which he was charged denies due process by permitting conviction merely for a criminal propensity. But that contention was rejected by this Court in *Russell.* Due process principles are not violated by making the availability of the defense of entrapment turn upon the defendant's predisposition: although the absence of any criminal propensity may in some cases serve to sustain an entrapment defense, in no case is a defendant convicted merely upon proof of criminal propensity; a conviction ultimately rests not upon the defendant's predisposition toward crime, or upon any speculation or presumption with regard to the probability that he may turn to crime in the future, but upon proof beyond a reasonable doubt that he in fact committed the specific crime charged in the indictment.

Petitioner here seeks recognition of an absolute defense based on the presence of a single fact, the provision of contraband by a person who has some connection with the government. Regardless of the approach by which such an action is to be evaluated, all members of both the *Sorrells* and the *Sherman* Court would surely have agreed that, by itself, the supplying of contraband could not possibly create the least risk of inducing to criminal acts those "who would normally avoid crime and through self-struggle resist ordinary temptations." *Sherman* v. *United States, supra,* 356 U.S. at 384 (concurring opinion of Mr. Justice Frankfurter). What this Court must evaluate in this case, in other words, is law enforcement conduct that, while useful for apprehending the "unwary criminal," poses no risk of trapping the "unwary innocent" (356 U.S. at 372).

We turn now to the discussion of whether the provision of contraband by government agents or informants, although not implicating the essential concerns underlying the traditional defense of entrapment, is nevertheless otherwise so offensive to notions of essential fairness that wrongdoers should be afforded a defense on the basis of the presence of such conduct.

A. THE FURNISHING OF CONTRABAND IS NOT CONSTITUTIONALLY DISTINGUISHABLE FROM THE FURNISHING OF ANY OTHER MEANS INDISPENSABLE TO THE COMMISSION OF THE OFFENSE

The protections of due process that petitioner attempts to invoke here serve to ensure that the individual, in his relations with the state, will not be treated unfairly, in a manner "shocking to the universal sense of justice." *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246. But petitioner has failed to demonstrate that a conviction resulting from governmental furnishing of contraband to him in the circumstances of this case would be fundamentally unfair.

If petitioner is to prevail in this case, he must draw a constitutionally significant distinction between the governmental conduct alleged here, *i.e.,* the furnishing by an informant of the contraband petitioner is charged with having sold, and the conduct at issue in *Russell, i.e.,* the furnishing by a government agent of a means indispensable to the commission of the offense there charged. This petitioner has not done and cannot do.

The only relevant distinction between the heroin allegedly supplied here and the phenyl-2-propanone supplied in *Russell* is that heroin is contraband whereas phenyl-2-propanone is not. It is upon this distinction that petitioner, at bottom, relies. But it is a distinction without any constitutional force, for it does not significantly bear upon the likelihood that an otherwise law-abiding individual will be unfairly inveigled by the government into the commission of a crime; it does not bear upon the fundamental fairness of the criminal investigation and subsequent prosecution.

It is, of course, clear that no constitutional distinction can be drawn between contraband and noncontraband on the basis of relative obtainability. The "unfairness" alleged in *Russell* lay in the fact that phenyl-2-propanone, although a lawful substance, was difficult to obtain, and therefore that the defendant probably would not have been able to commit the specific offense

charged in the indictment but for the governmental furnishing of the chemical. But the countervailing fact deemed controlling by the Court was that since phenyl-2-propanone was not actually otherwise unobtainable, the absence of any governmental furnishing would not have precluded the defendant from committing other similar offenses. See also *Lewis* v. *United States,* 385 U.S. 206; *Osborn* v. *United States,* 385 U.S. 323. That reasoning is fatal to petitioner's claim here. Petitioner does not assert that he would have incurred any greater difficulty in procuring heroin from nongovernmental sources than the defendant in *Russell* faced in independently obtaining phenyl-2-propanone. Any such assertion would, moreover, have rung conspiciously false in view of petitioner's testimony concerning his lengthy heroin addiction and his admission that he had had access to heroin during the months immediately preceding his arrest (see p. 4, *supra*). It was, therefore, no more unfair for the government to convict petitioner after furnishing him with heroin, if that is in fact what occurred, than for it to convict in *Russell* after furnishing phenyl-2-propanone to the defendant there.[9]

Nor may any constitutional distinction be drawn between the furnishing of contraband and the furnishing of noncontraband on the basis of their respective likelihoods of "manufacturing * * * crime" (Pet. Br. 21). Indeed, petitioner does not even suggest that governmental provision of contraband is more "crime-creating" than the provision of any other indispensable means. Instead, he rests upon the broad contention that due process bars conviction wherever the government has supplied "the *sine qua non* of the offense" (Pet. Br. 21). But that contention was expressly rejected in *Russell,* where the Court refused to adopt "a rigid constitutional rule that would preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent 'supplied an indispensable means to the commission of the crime'" (411 U.S. at 431). Instead, the Court held that (411 U.S. at 432) "the supply of some item of value that the drug ring requires must, as a general rule, * * * be permissible" and that (411 U.S. at 435) "'* * * the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution * * *.'" See also *Sorrells* v. *United States, supra,* 287 U.S. at 441; *Sherman* v. *United States, supra,* 356 U.S. at 372.

Of course, the governmental provision of any indispensable means to an individual who is criminally predisposed may lead to the commission of a particular crime that would not otherwise have been committed. In *Russell,* for example, the defendant would not have engaged in the particular manufacture and sale of methamphetamine for which he was convicted but for

[9] It may well be that convictions resulting from the furnishing of an indispensable means are constitutionally impermissible where the means in question was otherwise wholly unobtainable by the particular defendant. But obtainability, regrettably, does not turn upon whether the "facilities" are or are not contraband. Neither, therefore, should any constitutional rule.

the governmentally supplied phenyl-2-propanone. But law enforcement tactics that result in the commission of a particular crime by one criminally predisposed are not impermissibly crime-creating: the teaching of *Russell* is that there is no denial of due process, and no unfairness, where the government convicts a defendant who, like petitioner, has attempted to exploit a perceived opportunity, created by the government, to satisfy his own pre-existing criminal propensities.[10]

Furthermore, we see no reason, and petitioner suggests none, for believing that the provision of contraband would be significantly more likely to induce crime than the furnishing of other indispensable means. Otherwise innocent persons are unlikely to be led into crime by informants or undercover agents posing as narcotics suppliers. But to the extent that governmental furnishing of contraband might induce the commission of an offense by one "who would normally avoid crime and * * * resist ordinary temptations" (*Sherman* v. *United States, supra,* 356 U.S. at 384), it is already protected against by the defense of entrapment. That defense bars conviction for commission of a crime by an individual who, because lack-

[10] Moreover, the particular offense that may result from the provision of contraband occurs in a governmentally monitored setting in which there is little likelihood that the contraband may escape through private channels to be used for anti-social purposes. The practice of providing contraband, or any other indispensable means, is therefore no more "crime-creating" than the medical practice of innoculation is "disease-creating": it is a tactic that is designed to prevent or terminate an entire course of criminal dealings by the expedient of facilitating the commission of a particular offense in controlled surroundings.

ing criminal predisposition, "would not have perpetrated [the offense] except for the trickery, persuasion, or fraud of the officer." *Sorrells* v. *United States, supra,* 287 U.S. at 454 (concurring opinion of Mr. Justice Roberts).

In short, the law enforcement tactic of furnishing contraband poses no risk for law-abiding individuals, and convictions of criminally predisposed individuals resulting from such furnishing are not unfair *per se.* Moreover, for reasons that we now discuss, governmental provision of contraband in some circumstances may be necessary to effective criminal enforcement of the narcotics laws.

B. THE RULE FOR WHICH PETITIONER CONTENDS COULD SIGNIFICANTLY HAMPER ENFORCEMENT OF THE NARCOTICS LAWS

1. Governmental furnishing of contraband may in some circumstances be necessary to effective law enforcement

The peculiar nature of the illicit narcotics trade requires the use by the government of special investigatory techniques. Since narcotics offenses are "victimless crimes" (in the narrow sense of the phrase), there is seldom any injured party likely to bring a complaint; members of the general public are rarely in a position to assist law enforcement authorities in ferreting out narcotics violators; narcotics transactions normally are shrouded in secrecy; at a distance, illicit sales are difficult to distinguish from innocent conversations; and evidence is easily destroyed. See Bancroft, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense,* 31 U. Chi. L. Rev. 137, 140 (1963). For these reasons,

ordinary techniques of surveillance and investigation have been found to be ineffective in enforcing the narcotics laws; resort to undercover agents and informants has proved to be indispensable to enforcement. Narcotics offenses are committed "under such circumstances that perpetrators might never be discovered if government representatives were not permitted to participate to some extent." *Whiting* v. *United States*, 321 F. 2d 72, 76 (C.A. 1), certiorari denied, 375 U.S. 884. See also *Osborn* v. *United States*, *supra*.

Undercover investigation of illegal narcotics enterprises may often require the government to furnish facilities for the commission of crime; an undercover agent may, for example, be required to furnish money, tools, or a car, or allow the use of his premises to plan the crime. See, *e.g.*, *Johnson* v. *United States*, 317 F. 2d 127 (C.A.D.C.). This Court explicitly sustained the constitutionality of that practice in *Russell* (411 U.S. at 432):

> The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or [be] "shocking to the universal sense of justice" * * *.

The "item of value" required to be furnished may in some situations be contraband: the governmental provision of contraband may, in a given case, be the only practicable means of gaining the confidence of the participants in the illegal enterprise. Cf. *United States* v. *McGrath*, *supra*. We see no constitutional basis for depriving law enforcement authorities of that means.

Moreover, the rule petitioner proposes—that no defendant can be convicted for selling contraband that he procured from an informant or other government agent—would not merely interfere with some affirmative efforts at infiltration. The adoption of that rule could undermine narcotics enforcement efforts generally by providing a means by which all undercover agents could be detected and neutralized. A constitutional rule that effectively forbade the governmental furnishing of contraband could quickly be converted by narcotics traffickers into a sword rather than merely a shield: prospective confederates could be tested by requiring that they furnish contraband for the carrying on of the illegal enterprise. The particular *per se* rule proposed by petitioner therefore

represents a manifestly inappropriate balance between, on the one hand, society's legitimate interest in the detection and prevention of serious criminal activities and, on the other, the interest of potential or actual criminals in having law enforcement authorities "play fair."

2. There is no basis for the promulgation of a broad defense based upon the defendant's source of supply

In view of the facts that contraband is not *per se* more diffiicult to obtain than other indispensable criminal means, that the furnishing of contraband is no more likely to induce crime than the furnishing of other means, and that the governmental furnishing of contraband is a highly useful and in some cases necessary law enforcement technique, it is, we believe, clear that there is no constitutional basis for the broad defense urged by petitioner.

To the contrary, if an general rule is to govern this area of the law, it is that the governmental furnishing of contraband is merely one fact to be considered in connection with the standard defense of entrapment. That rule would adequately protect against unfair law enforcement tactics that might threaten to overbear an otherwise innocent individual's will, while preserving the government's legitimate interest in effective criminal enforcement of the narcotics laws.

a. Certainly this is not an area of the law where a rigid due process defense would be appropriate. The factual circumstances in which a government agent, or an informant acting with the sanction of

the government, furnishes contraband in connection with the infiltration of a narcotics ring are too varied to make appropriate the application of a rigid, one-dimensional due process rule. The situation to which petitioner's argument appears to be addressed is that where the government, acting through a government agent or familiar, paid informant, arranges to provide a suspect with the narcotics that it has also arranged, through other undercover agents, to purchase from him. That is, in fact, a comparatively rare situation,[11] although, for the reasons stated throughout this brief, we submit that a conviction based upon such a purchase, from an individual predisposed to traffic in narcotics, does not contravene the requirements of due process. But even if such investigative techniques were determined to be fundamentally unfair—and we reiterate that in our view they are not—there are many other not uncommon situations in which the indirect governmental furnishing of contraband, through an informant, would, we believe, remain entirely proper.

For example, in some cases individuals who have been requested by narcotics traffickers to transport contraband have voluntarily divulged the facts concerning the illegal enterprise to government agents and then completed delivery under governmental

[11] We have been informed by the Drug Enforcement Administration that prior approval of direct governmental furnishing of contraband must be obtained from both the United States Attorney and the Administration's Assistant Administrator for Enforcement, that approval is granted only in connection with efforts to infiltrate known criminal activities, and that approval was granted only twice during 1974.

supervision. See, *e.g.*, *United States* v. *Arias-Diaz*, 497 F. 2d 165 (C.A. 5); *United States* v. *Register*, 496 F. 2d 1072 (C.A. 5). In others, couriers may offer to become informants and to continue transportation of the narcotics after being apprehended *en route*. Cf. *United States* v. *Kohn*, 365 F. Supp. 1031 (E.D. N.Y.), affirmed *per curiam*, 495 F. 2d 763 (C.A. 2); *United States* v. *Mitchell*, Cr. No. 74–H–179, decided November 26, 1974 (S.D. Texas) (defendant's supplier became an informant only after furnishing the contraband). In still other cases, events may have intervened so as to break the connection between the governmental furnishing of contraband and the narcotics transaction for which the defendant is ultimately tried. See *United States* v. *Ramey*, Cr. No. 73–H–389, decided November 8, 1974 (S.D. Texas). These varied cases cannot be made to lie in the same Procrustean bed, unless the result would be to sustain the propriety of the official conduct in each.

b. Moreover, it is our belief that the majority of cases in which a defendant has sold contraband that he will claim to have procured from an informant will be cases in which the informant's alleged furnishing of narcotics was not known to the government. Indeed, this is just such a case. The government's evidence directly contradicted petitioner's testimony that he was furnished heroin by the informant, Hutton, and there is no evidence anywhere in the record that even suggests that the investigating government agents had any knowledge concerning petitioner's source of supply. Petitioner's requested instruction (see p. 5, *supra*), which is similar to the one

now given in the Fifth Circuit (see n. 7, *supra*), would require acquittal in his case and in all such similar cases.[12] That result is manifestly incorrect.

The government exercises little control over the activities of many of its informants and may have little knowledge about the extent to which they may operate as narcotics suppliers and no knowledge of particular sales. Although the government may not "disown" the successful blandishments or inducements of an informant (*Sherman* v. *United States*, *supra*, 356 U.S. at 373), not all the conduct of an informant may appropriately be imputed to the government. Certainly where an informant illegally, without the knowledge and approval of a government agent, acts as a drug supplier, the government cannot fairly be regarded as "involved" in the furnishing of contraband. We can conceive of no consideration of public policy that would justify acquitting a defendant on the ground that his supplier was an informant whose illicit activities were unknown to the government.

Such an acquittal would be clearly incompatible with this Court's decision in *Russell*. In that case, a government agent supplied the phenyl-2-propanone necessary to the manufacture of methamphetamine, was present during, and incidentally participated in,

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[12] Moreover, the instruction actually given in the Fifth Circuit (and this presumably is implicit in petitioner's requested instruction as well) places upon the government the burden of proving that the contraband the defendant is charged with having sold was not procured from an informant—even where the government may in fact have no knowledge concerning the defendant's source of supply. See *United States* v. *Mosley*, *supra*.

the manufacture, and purchased a portion of the final product. This Court expressly rejected the claim that those facts revealed "an intolerable degree of governmental participation in the criminal enterprise" (411 U.S. at 427). A *fortiori*, the more extravagant claim embodied in petitioner's requested instruction—that even the comparatively less comprehensive involvement of a mere informant whose actions are not known to or sanctioned by the government entails impermissible governmental participation in the crime—must also be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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